IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 20, 2001

STATE OF TENNESSEE v. HAISON FIELDS

Direct Appeal from the Circuit Court for Bedford County
No. 14629 William Charles Lee, Judge

No. M2000-02144-CCA-R3-CD - Filed October 8, 2001

The defendant, Haison Fields, was convicted by a Bedford County jury of attempted first degree murder, Tenn. Code Ann. § 39-13-202, a Class A felony. After a sentencing hearing, the trial court imposed upon Defendant the maximum possible sentence of twenty-five years. In this appeal, Defendant presents the following issues: (1) the evidence presented at trial was insufficient to sustain his conviction; (2) the trial court erred by failing to instruct the jury on numerous lesser-included offenses as required under State v. Burns, 6 S.W.2d 453 (Tenn. 1999); and (3) the trial court erred by failing to give proper weight to an applicable mitigating factor which resulted in Defendant receiving the maximum sentence: twenty-five years. Following a review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES, J. and TERRY LAFFERTY, Sp.J., joined.

John B. Nisbet, III, Cookeville, Tennessee (on appeal); Donna Orr Hargrove, District Public Defender; and Andrew Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee (at trial) for the appellant, Haison Fields.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; J. W. Michael McCown, District Attorney General; Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

At approximately 6:00 p.m. on December 14, 1999, Jerry Wayne Burrows was attacked as he prepared to leave his office at the back of Jeremy's Car Corral on Madison Street in Shelbyville, Tennessee. Burrows grappled with his assailant and suffered fifteen stab wounds before he was able

to escape from his office to the car lot outside. The attacker had also hit Burrows with a television and sprayed "Easy Off" oven cleaner into his face and eyes, so Burrows was half-blinded as he struggled toward the street in search of someone to assist him. The first person Burrows reached was sitting in a van waiting for the light to change. Burrows clung to the passenger side of the car for a few minutes, begging the driver to help him, and then collapsed onto the street. At this point, it was apparent to the people watching that Burrows was truly hurt, and they rushed to help him. An ambulance arrived shortly thereafter. Burrows was taken to a helicopter, which then air lifted him to Vanderbilt Medical Center where he was immediately operated upon. Burrows survived, following surgery and treatment.

Sharon Brantley was the driver of the van first approached by Burrows. Shortly beforehand, as Brantley was slowing to stop at the intersection in front of Jeremy's Car Corral, she had noticed movement in the adjacent car lot. Near the office, a man with short, cropped, "kind of floppy" hair, and a light-colored jacket or shirt appeared to be leaning or shaking hands with someone. Later, she professed uncertainty whether she saw one or two persons, and she was also not completely certain whether the person she observed was male or female. Whatever the case, Brantly claimed that the unidentified person(s) hurried across the parking lot and disappeared while she was still waiting at the light. The time was approximately 6:15 p.m. Brantley's ten-year-old daughter was in the car with her. They were on her way to go Christmas shopping and completely unprepared for the sudden appearance of a bloody man at their window.

When Burrows first appeared, neither Brantley nor her daughter realized that he had just been assaulted. Burrows simply materialized and began pounding on the passenger side window and shouting, "Help, help, help me." Brantley's first reaction was to make sure her car doors were locked. Her daughter was upset. The man kept looking over his shoulder at the car lot and exclaiming, "He is going to kill me--call help." It was apparent that he wanted them to let him into the van, but Brantley was not going to let a stranger inside of the car with her daughter present. Brantley called 911 on her cell phone, but she was having trouble getting through. Moreover, she initially believed that the man was part of a joke, that someone was playing a trick on them. She did not realize that the substance Burrows was smearing over her van and windows was blood until he turned his head and she saw blood gushing from his neck wound. Then Burrows stood back from the van for a moment to show them his shirt. Brantley was able to observe knife cuts across Burrows' stomach before he quickly reattached himself to the van. Brantley told the man, "Okay. Just get off the van and let me pull off of the road and I will get you help," but he did not let go. Brantley edged over to the curb slowly. When she had the van parked, Burrows finally released his grip and collapsed onto the sidewalk.

As Brantley exited the van and approached Burrows, he reached for her and said, "I'm dying. I'm dying. Help me." Brantley told him to be still. By then, she was in contact with the police dispatcher at the sheriff's department and help was on the way. Brantley leaned over Burrows and asked, "Who did this to you?" Burrows replied, "Haison Fields." He repeated the name to her over and over again. Other people were appearing at that point: a nurse began treating Burrows, a woman

exclaimed that she saw a white car drive away, a police officer walked up, and then the ambulance arrived to take Burrows to the hospital.

A woman named Nina Driver was also waiting at the light when the incident occurred. She was two or three cars from the intersection when Burrows ran up to Brantley's van and started beating on the window. Driver assumed that Burrows was drunk. She sat and watched until he crumpled to the ground, and then she got out of her car and ran over to help him. Upon closer inspection, Driver discovered that Borrows had bloody cuts "everywhere." At this point, she happened to glance in the direction of the car dealership and observed a small, white sports car parked on the lot with its interior light on. She did not see anyone inside of it and returned her attention to Burrows. Driver asked him what happened, and he told her that a man named Haison Fields, who worked at Heilig-Meyers in Tullahoma, had stabbed him.

Shannon Gilmore was also waiting for the light when Burrows collapsed onto the sidewalk. From her vantage point, she was unable to see him, however, and thought that a small accident had occurred. Gilmore was attempting to drive around the "problem" when her daughter told her that she saw a man was lying on the ground. Looking at the traffic around her, it appeared as though no one was helping him–the drivers were all still sitting in their cars. Gilmore leaned over to find out what was happening and recognized the man on the ground as "Jerry Wayne." She then drove through the car lot to get closer. As she did, she noticed a white car leaving the lot "in a hurry." Traveling "too fast for that area," the car spun out in the gravel as it pulled away. Gilmore described the car as having a long front end, "sort of like a Nissan 280 or 240 sports car." Arriving at Burrows' side, Gilmore asked him what happened. Burrows told her that a man with a name that sounded like "Haison" or "Hisson" from Tullahoma had tried to kill him "over a hot check."

The first Shelbyville police officer on the scene, Jerry Lawrence, was not on-duty at the time. He was driving home after his shift, at approximately 6:27 p.m., when he noticed a disturbance in the traffic and pulled over to investigate. As he approached the area in question, he observed Burrows lying on the sidewalk. Burrows' face was red. He was also profusely bleeding from numerous wounds and having difficulty breathing. Lawrence and Burrows knew each other. When Burrows recognized Lawrence, he mumbled some words which sounded to Lawrence like, "Yvonne field cut me." He repeated these words over and over again. Talking appeared to be difficult, and his voice gurgled due to his wounds. After Lawrence confirmed that an ambulance was on the way, he began assisting the police officers who had arrived in the interim. As they approached Burrows' office, they noticed that the door was wide open, the contents were in disarray, and blood was spattered everywhere. A quick search revealed no one present. Then the scene was secured until the crime lab team had an opportunity to investigate.

Officers Tony Collins and Mike Rogers with the Shelbyville Police Department were among the first on-duty policemen to arrive at the crime scene on December 14, 1999. Collins noted that Burrows appeared to be going into shock. When Collins asked Burrows to identify his attacker, Burrows replied that "Haison Fields had cut him." Officer Rogers reported that Burrows had given him similar information. Shortly thereafter, Officer Pat Mathis and Lieutenant Chris Szaroleta, also

with the Shelbyville Police Department, were dispatched to Defendant's residence to arrest him. When Szaroleta advised Defendant that Burrows had named him as his attacker, Defendant responded that he had never been to Shelbyville and denied purchasing a car there. A search of Defendant's car and residence revealed a pair of pants and matching jacket stuffed behind the washer and dryer machines. The jacket bore a Heilig-Meyers logo, and both pieces had numerous stains consistent with the appearance of blood. The police also discovered two folding knives, a bill of sale for the Nissan 300 ZX that Defendant had purchased from Burrows, and additional blood-like stains on the interior surfaces of Defendant's car. Subsequent DNA analysis by the Tennessee Bureau of Investigation crime lab in Nashville matched the stains on Defendant's uniform pants and jacket with the blood of the victim, Jerry Burrows. The blood on the interior of the Nissan 300 ZX belonged to Defendant.

Meanwhile, Burrows arrived at Vanderbilt Hospital in Nashville by life flight helicopter. He was taken directly to the operating room. Dr. Ken Richards, a fourth year resident at Vanderbilt, testified at trial that Burrows had sustained approximately fifteen stab wounds to his neck, chest, and back. Burrows also had some redness and skin irritation of unknown origin on his face. Because one of the stab wounds was located in the abdominal region, Burrows was required to undergo an "exploratory laparotomy." This procedure calls for an incision of approximately twelve inches, from the throat to the belt buckle, which divides the abdominal wall so that the surgeon may examine the vital organs for damage. When the surgeons performed this procedure on Burrows, they discovered a two-centimeter laceration to the left lobe of the liver which was "actively bleeding." The remainder of Burrows' internal organs had escaped injury. After his liver laceration was sutured, the remainder of his wounds were cleaned, and then stapled or sutured also. Dr. Richards testified that the injury to Burrows' liver could be classified as "potentially life-threatening," but he could not say for certain whether Burrows would have died if he had not received treatment on December 14, 1999.

According to Burrows, the victim, the assault was the result of an altercation between himself and the defendant, Haison Fields, over some bad checks that Defendant wrote him in payment for a vehicle, i.e., the pearl-white Nissan 300 ZX driven by Defendant at the time of the offense. Burrows' relationship with Defendant began when Defendant advised Burrows that he was interested in purchasing a Nissan he had observed on Burrows' car lot. Burrows told him the price of the car and informed him that some body work and brake repair was required before it would be ready for sale. Defendant replied that he wanted to buy the car when the work was completed. The body work took longer to complete than expected, and Defendant called Burrows every few days with questions about the delivery date. He appeared anxious to purchase the car. When the body shop returned the car to the lot on November 17, 1999, Defendant told Burrows that he would rather fix the brakes himself. He gave Burrows a check in the amount of $9446, the purchase price of the car, and Burrows gave Defendant the vehicle and a bill of sale.

A few days later, the bank called Burrows to tell him that Defendant's check had been returned because of insufficient funds in his account. Burrows asked the bank to "rerun" the check. He then called Defendant, who said rerunning the check was a good idea because the money was

there. Burrows' bank called him again a few days later, however, to tell him that the funds in Defendant's bank account remained insufficient to cover his check and they could not process it a second time. When Burrows informed Defendant that his check had been returned again, Defendant replied that the bank must have "lost his money." Burrows asked Defendant to bring him another check, and Defendant complied. The second check was also deposited twice, however, and it was returned both times.

At this point, Burrows told Defendant that he would prefer a cashier's check in lieu of a third personal check. Defendant asked Burrows to give him a day or two to solve whatever problem the bank was having, and he would bring Burrows a cashier's check. Having received no word for a few days, Burrows again called Defendant. Defendant claimed that he would bring a cashier's check to Burrows' office the next day. When Defendant arrived, he was patting his jacket and searching the pockets as if he had lost something. He asked to borrow Burrows' phone and appeared to have a conversation with someone during which he asked whether a white envelope could be observed sitting on the table. After he hung up, Defendant informed Burrows that he had inadvertently left the check at home and would return the next day. The following day, an employee who had arrived early found a note from Defendant explaining that he had come by with the check as promised, but, apparently, he missed them. The note included a cell number to call, but, Burrows was informed that no such number existed when he tried to call it. Thereafter, Burrows called someone at Heilig-Meyers who gave him the correct number for Defendant's cell phone. When he finally reached Defendant, Defendant promised to come by the car lot at approximately 2:00 p.m. that day with the check. Shortly after 3:00 p.m., Burrows saw Defendant pull into the opposite end of the car lot driving the Nissan 300 SX. However, Defendant and the Nissan were gone by the time he got there. A bystander informed him that Defendant had driven through the lot and left. Burrows called Defendant again, asking for his check, and Defendant again said that he would bring it over.

As Burrows was preparing to go home later that day, Defendant drove up in the Nissan and got out of the car. Burrows assumed that Defendant was there to give him his long-expected cashier's check. Burrows headed for his office and Defendant followed him. Burrows asked Defendant whether he brought the cashier's check and Defendant replied affirmatively, but said that he would give it to him only if Burrows could return his two bad checks. Burrows said that he only possessed the first check–the bank still held the other. However, Defendant said that he wanted both of them "now." Burrows asked again whether Defendant brought the cashier's check, and Defendant said, "Yeah, I've got it" and held up an envelope. Burrows wanted to see it, but Defendant restated that he wanted to see his two checks first. Burrows reiterated that the second check was still at the bank, and then he picked up his telephone to call the bank and find out whether anyone was working late who could help him. As Burrows began to dial, Defendant jerked the telephone from his hand and said, "Don't you call the law on me." Burrows informed Defendant that he was merely trying to reach the bank to get the second check. At this point, Burrows could sense hostility from Defendant and felt that "something was wrong." Burrows claimed that Defendant had been "nice" and not exhibited any hostility prior to that moment. Since Defendant would not let him call the bank and nothing else could be done, Burrows asked Defendant to return the next day. Defendant replied that this was not possible because he had to work. Burrows offered to send someone to

Heilig-Meyers with Defendant's check, who could also pick up the cashier's check, but Defendant seemed to find this plan unsatisfactory.

Defendant responded to Burrows' offer by stating, "I have had all I can take today," or something similar, and then sprayed Burrows' face with a substance that burned his skin and blinded his eyes. Burrows was on the other side of his desk at the time. Defendant started moving toward him, stating he intended to kill him. Burrows pleaded with Defendant to stop--he told Defendant that he would *give* him the car--but Defendant knocked him into the filing cabinets and began to stab him. Burrows started bleeding everywhere. He fought with Defendant and wrested the knife from him at some point, but it was slippery with blood and flew out of his hand. Burrows made it to the door and opened it once, but Defendant kicked it closed and told him he was "going to die." Then Defendant slashed his throat twice, and Burrows fell to the floor in front of the television. Defendant picked up the television and threw it on top of him. Burrows grabbed Defendant by the throat, squeezed as hard as he could, and then passed out. When he awoke, he was laying on the floor of his reception room. Defendant was laying unconscious beside him. Burrows got up and headed for the street as fast as he could. The vehicle nearest to him was a van; it was waiting at the light and a little girl was sitting in the passenger seat. Burrows ran to the window and the girl started to scream. Burrows knew he had blood all over him and that he was getting it all over the van too. He remembers telling the occupants of the van that he needed help and then crumpling onto the sidewalk.

When he regained consciousness, people were everywhere. Burrows recalled giving some people names of other people to contact, and then he blacked out again. When he regained consciousness the second time, Officer Rogers was bent over him asking "who did this," and he named Defendant as his attacker. The next thing Burrows recalled was waking up in the recovery room at Vanderbilt Hospital. Burrows did not recall the precise time that the stabbing incident occurred, but estimated that it was between 5:30 and 6:00 p.m. on December 14, 1999. He claimed that he was not angry with Defendant on that day and that he had said no harsh words to Defendant during their meeting. He only wanted his money.

A few days after Burrows was stabbed, Clyde Bush, one of the employees at the car lot, drew the attention of the police to the presence of a brand new can of Easy Off oven cleaner in Burrows' office. Bush recalled observing the lid to the can laying in the customer parking area near the office when he returned to work to talk with the investigating officers about the attack on his employer, shortly after the stabbing. He had noticed the can of oven cleaner on Burrows' desk at that time, and recalled that it had not been there before the stabbing incident.

The TBI crime lab analyzed the can and cap for latent fingerprints, but was able to recover only one. Oakley McKinney, a forensic fingerprint expert who worked at the TBI crime lab, testified at trial that although he was unable to identify the owner of the fingerprint, he was certain that it did not belong to Defendant. On cross-examination, McKinney further testified that the failure to find any of Defendant's fingerprints on the can or cap was not conclusive evidence regarding whether he had actually touched either object. Latent fingerprints may last indefinitely or can dissipate instantly,

depending on ambient moisture and other factors. Further, latent fingerprints are generally fragile; time, temperature, and friction, e.g., someone handling the can or cap afterward, would affect the ability of the crime lab to recover identifiable fingerprints from the objects.

Defendant chose not to testify at trial, but presented an alibi defense based on the testimony of various witnesses who stated that they had observed him in Tullahoma near the time of the crime. William Young, an employee at the Heilig-Meyers warehouse in Tullahoma where Defendant worked as the warehouse manager, testified at trial that Defendant was still at work at 5:30 p.m. on the day the crime was committed. On cross-examination, Young admitted that he was uncertain of the time–he may have last seen Defendant as early as 5:00 p.m. Bonnie George, the assistant manager for the Tullahoma office, testified that Defendant was still at work between 5:30 and 5:45 p.m. Maureen Brown, the credit manager for Helig-Meyers, testified that she came by the warehouse to pick up furniture and noticed Defendant driving away at approximately 5:50 p.m. Stephanie Uselton, an acquaintance of the Defendant, testified that she saw Defendant between 5:30 and 5:45 p.m. while driving down the road to her residence in Tullahoma. She claimed that he had his work uniform on at that time and that they spoke for approximately five minutes.

Shona Poe, an employee of the Texaco gas station in Tullahoma, testified that Defendant came into the Texaco station in his Nissan 300 SX a little after 6:00 p.m. on December 14, 1999, and left at 6:10 or 6:11 p.m. The gas station receipt discovered in the glove box of Defendant's car during a search by police officers showed the time Defendant was allegedly at the Texaco station as being 6:04 p.m., but the receipt also showed the customer's name to be J. Hodgkin and the vehicle as a Ford 150 truck. Poe admitted that she did not know Defendant's name. However, she claimed to specifically recall that Defendant used the credit card on December 14, 1999, because she always chatted with him when he came in. Poe further testified that she never questions the patrons of the gas station who use company credit cards to put gas in their personal vehicles, and she did not know whether the clock which controlled the time/date stamp was correct. According to the testimony of Jason Williams, one of the police officers who searched Defendant's residence, the distance between the Wal-Mart in Tullahoma and Jeremy's Car Corral in Shelbyville can be traveled in thirteen minutes and thirty-six seconds, if one drives the speed limit.

At the conclusion of proof at trial, the trial court instructed the jury on attempted first degree murder and the lesser-included offense of attempted second degree murder. The jury found Defendant guilty of attempted first degree murder. At his sentencing hearing, Defendant denied any knowledge regarding how his blood-stained work clothing became lodged behind his washer and dryer machines. He also claimed to feel no remorse for the crime because he did not commit it. Defendant admitted that the information related by Burrows was true, including the episodes regarding the bad checks, with the exception of Burrows' rendition of the events of December 14, 1999. Defendant also testified that he only went to see Burrows at the car lot one time.

ANALYSIS

I. Sufficiency of the Evidence

Defendant contends that the evidence presented at trial was insufficient to sustain his conviction for attempted first degree murder. We disagree.

When evidentiary sufficiency is questioned on appeal, the standard of review is whether, after considering all the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this Court will not reweigh the evidence or substitute our own inferences for those drawn by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978); Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). Instead, on appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. Hall, 8 S.W.3d at 599. A guilty verdict by a jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory, effectively removing the presumption of innocence and replacing it with a presumption of guilt. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions concerning the credibility of witnesses, the weight and value of evidence, as well as all factual issues raised by the evidence, are matters resolved by the trier of fact, not this Court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). The defendant bears the burden of demonstrating that the evidence is insufficient to support his or her conviction. State v. Pike, 978 S.W.2d 904, 914 (Tenn.1998); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

As relevant here, the definition of first degree murder is "[a] premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1). Premeditation requires proof of "a previously formed design or intent to kill," State v. West, 844 S.W.2d 144, 147 (Tenn. 1992) (citations omitted), and that the act be done "after the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-202(d). This means that the intent to kill must have been formed prior to the act itself." Id. To be guilty of first degree murder, the accused must be "sufficiently free from excitement and passion as to be capable of premeditation." Id. A homicide, once proven, is presumed to be second degree murder, and the state has the burden of proving premeditation to raise the offense to first degree murder. State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998).

Although the jury may not engage in speculation, it may infer premeditation from the manner and circumstances of the killing. State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997); State v. Bordis, 905 S.W.2d 214, 222 (Tenn. Crim. App. 1995). Our Supreme Court delineated several circumstances that may support the existence of premeditation, including the use of a deadly weapon

upon an unarmed victim, the fact that the killing was particularly cruel, declarations of the intent to kill the victim by the defendant, the making of preparations before the killing for the purpose of concealing the crime, and calmness immediately after the killing. See Bland, 958 S.W.2d at 660.

Guilt for an attempted offense is proven when the evidence establishes that

> A person . . . acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete the course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101(a) (1997).

Here, the evidence proving that Defendant was the person who attacked Burrows is overwhelming. The victim positively identified Defendant as his assailant, and DNA analysis proved that the blood stains on Defendant's pants and jacket matched that of the victim. Despite testimony presented by various witnesses which suggested that Defendant could not have committed the crime because he was in Tullahoma at the time it occurred, the jury chose to resolve the resulting conflict in favor of the State.

As previously stated, a jury may infer premeditation from the manner and circumstances of the killing, including the use of a deadly weapon upon an unarmed victim, the fact that the killing was particularly cruel, declarations of the intent to kill the victim by the defendant, and calmness immediately after the killing. See Bland, 958 S.W.2d at 660. Because proof of three of these four circumstances was presented, an inference of premeditation is permissible. Defendant's knife was a deadly weapon; Burrows was unarmed; Defendant's conduct could easily be deemed "particularly cruel"; and, Defendant declared his intent to kill the victim more than once.

The substance of Defendant's argument is that the verdict cannot be sustained because conflicting evidence was presented by the State and Defendant. On appeal, this Court will not reassess or reevaluate the evidence or overturn the jury's determination on issues concerning the

credibility of witnesses, the weight and value of evidence, or any factual issues raised by the proof. Cabbage, 571 S.W.2d at 835. This includes the testimony of alibi witnesses. See Forbes v. State, 559 S.W.2d 318, 324 (Tenn. 1977) (credibility of alibi witnesses and the weight given their testimony are determined exclusively by the jury). Upon viewing all of the evidence in the light most favorable to the State, we find that the evidence presented at trial was sufficient to establish beyond a reasonable doubt that Defendant was the person who intentionally and with premeditation attempted to kill Burrows on December 14, 1999. Defendant is not entitled to relief on this issue.

II. Failure to Instruct on Lesser-Included Offenses

Defendant also contends that the jury did not receive instructions on the lesser-included offenses of attempted first degree murder that were appropriate in his case, namely, attempted voluntary manslaughter, aggravated assault, simple assault, and reckless endangerment. Defendant argues that under the United States Constitution and State v. Burns, 6 S.W.2d 453 (Tenn. 1999), he has a constitutional right to complete and accurate instructions on the law of the offense charged and the trial court erred by not fulfilling its duty in that regard.

The question whether a given offense should have been submitted to the jury as a lesser-included offense is a mixed question of law and fact. State v. Guy William Rush, ___ S.W.3d ___, No. E1998-00592-SC-R11-CD, 2001 WL 334297 at *2 (Tenn. Amended July 25, 2001) (citing State v. Smiley, 38 S.W.3d 521 (Tenn. 2001)). Thus, the standard of review is de novo without a presumption of correctness. Id.

Defendant is correct in his assertion that, in criminal prosecutions, the accused has a right to fair and reasonable notice of the charges against him. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. This right to notice assures the accused that he or she may only be convicted of a crime which is raised by the indictment or a lesser-included offense thereof. Rush, 2001 WL 334297 at *2. A trial court must instruct the jury on all lesser-included offenses if the evidence introduced at trial is legally sufficient to support a conviction for the lesser offense. State v. Langford, 994 S.W.2d 126, 128 (Tenn. 1999). This duty applies "whether or not a defendant requests such an instruction." State v. Burns, 6 S.W.3d 453, 464 (Tenn.1999).

At the conclusion of proof at trial, Defendant requested that the trial court give the jury instructions on attempted second degree murder, attempted voluntary manslaughter, and aggravated assault as lesser-included offenses. The trial court denied Defendant's request, in part, instructing the jury on only the lesser-included offense of attempted second degree murder, in addition to the charged offense of attempted first degree murder. Although the trial court failed to include in its instructions various well-settled lesser-included offenses of the charged offense, under Burns, the trial court is not required to instruct the jury on lesser offenses unless it has also determined that (1) evidence exists that reasonable minds could accept as to the lesser charge and (2) such evidence is legally sufficient to support a conviction. Id. at 466-67. We need not make this determination, however, based on our supreme court's decisions in State v. Williams, 977 S.W.2d 101 (Tenn.

1998), and State v. Bowles, ___ S.W.3d ___, No. M1997-00092-SC-R11-CD, slip op. (Tenn. July 31, 2001).

In State v. Williams, the defendant was convicted of first degree premeditated murder. The trial court refused the defendant's request to instruct the jury on voluntary manslaughter as a lesser-included offense, but did instruct the jury on second degree murder and reckless homicide. Williams, 977 S.W.2d at 104. Holding that the trial court's failure to instruct on voluntary manslaughter was harmless, the Tennessee Supreme Court drew the following conclusion:

> [B]y finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense, second degree murder, the jury necessarily rejected all other lesser offenses, including voluntary manslaughter. Accordingly, *the trial court's erroneous failure to charge voluntary manslaughter is harmless beyond a reasonable doubt because the jury's verdict of guilty on the greater offense of first degree murder and its disinclination to consider the lesser included offense of second degree murder clearly demonstrates that it certainly would not have returned a verdict on voluntary manslaughter*.

Id. at 106 (emphasis added). This holding was restated by the supreme court in Bowles, a case in which the defendant appealed his conviction of aggravated rape. The Bowles court found the trial court's failure to charge the jury on the lesser-included offense of sexual battery to be harmless error because the jury was instructed on the lesser offenses of rape and aggravated sexual battery but determined that aggravated rape was the appropriate charge supported by the evidence. Bowles, slip op. at 9; but see State v. Ely, ___ S.W.3d ___, No. E1998-00099-SC-R11-CD, slip op. (Tenn. June 5, 2001) (declining to hold that failure to give lesser-included offense instructions was harmless in that case where the jury was not given an option to convict on any lesser offense).

Under Williams and Bowles, a similar result is warranted in Defendant's case. Defendant was charged with attempted first degree murder. The trial court instructed the jury the charged offense and on the lesser-included offense of attempted second degree murder, instructing the jury that if it determined Defendant was not guilty of attempted first degree murder, it should consider the lesser-offense of attempted second degree murder. Nevertheless, the jury returned a verdict of guilty as to the greater offense. Under Williams and Bowles, we conclude that by finding Defendant guilty of attempted first degree murder in lieu of attempted second degree murder, the jury necessarily weighed the evidence and determined that attempted first degree murder was the most appropriate charge supported by the evidence. Under the circumstances, we also find beyond a reasonable doubt that the result would have been the same even if the jury had received Defendant's proposed instructions and, thus, the trial court's failure to charge the jury on further lesser-included offenses, if error, was harmless beyond a reasonable doubt. See also Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Defendant is not entitled to relief on this issue.

III. Sentencing

Defendant contends on appeal that the trial court failed to properly consider his work history as a mitigating factor under Tenn. Code Ann. § 40-35-113(13) when it determined Defendant's sentence. Defendant asserts that, because the trial court erroneously believed that proper application of mitigating factor 40-35-113(13) required "exceptional" circumstances which it determined were not satisfied by Defendant's history of gainful employment, his maximum sentence of twenty-five years is excessive. We disagree.

Appellate review of the length, range, or manner of service of a sentence is de novo. Tenn. Code. Ann. § 40-35-401(d) (1997). In conducting its de novo review, this Court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the defendant in his own behalf; and (7) the potential for rehabilitation or treatment. Tenn. Code. Ann. § 40-35-102, -103, -210 (1997); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is upon the defendant to demonstrate the impropriety of his sentence. Tenn. Code. Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. § 40-35-401(d); Ashby, 823 S.W.2d at 169. Here, the record reflects that the trial court basically complied with sentencing principles and considered the relevant facts and circumstances but incorrectly applied one enhancement factor. Therefore, our de novo review is conducted with a presumption of correctness except as to the length of Defendant's sentence.

As a preliminary matter, we note that Defendant's allegation of error by the trial court is generally unsupported by facts or law in his brief. Defendant asserts that the trial court erred when it failed to give his work history significant weight, but offers no argument as to why his work history should be considered extraordinary and fails to cite any legal authority to support his contention. Defendant merely quotes the statutory language in Tennessee Code Annotated section 40-35-113(13), which states that mitigating factors may include "any other factor consistent with the purposes of this chapter," and asserts that a more appropriate sentence would be twenty years, the midpoint in the range. We may treat issues unsupported by argument, citation to authorities, or appropriate references to the record as waived. Crim. App. Ct. R. 10. Notwithstanding, we shall briefly address Defendant's contention.

It is well-settled that the weight to be afforded sentencing factors is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). After a review of the record and applicable law, we conclude that

the trial court properly declined to afford any significant weight to the mitigating factor asserted by Defendant.

In its brief, the State points out that this Court has previously considered the appropriate weight to be given a steady work history and determined that "every citizen is expected to have a stable work history if the economy permits the citizen to work, the citizen is not disabled, or the citizen is not independently wealthy." State v. Clayton Eugene Turner, No. 03C01-9805-CR-00176, 1999 WL 817690 at *16, Sullivan County (Tenn. Crim. App., Knoxville, October 6, 1999) perm. to app. denied (Tenn. April 2000) (citing State v. Curry, No. 02C01-9711-CR-00452, 1998 WL 376353, at *5 (Tenn. Crim. App., Jackson, July 8, 1998), perm. to appeal denied (Tenn. Dec.1998)). Here, the trial court similarly observed that "merely doing those things which society expects of you is not exceptional" and that Defendant's gainful employment did not warrant a reduction in his sentence. We agree, finding that Defendant's history of consistent and gainful employment in no way mitigated his vicious assault on the victim in this case.

Although not directly challenged by Defendant, our de novo review includes the trial court's application of enhancement factors (1), (8), (9), (13), and (19) to determine whether Defendant's sentence is excessive. Consequently, we find factors (1), (8), (9), and (13) are appropriate but enhancement factor (19) is inapplicable. Enhancement factor (19) requires that the court to find that "the lack of immediate medical treatment would have probably resulted in the death of the victim under § 39-15-402." Id. § 40-35-114(19). Tennessee Code Annotated section 39-15-402 is the statute for the offense of aggravated child abuse. For this reason, enhancement factor (19) clearly has no application to this case.

In sum, because we find that the trial court properly refused to apply the proposed mitigating factor and the facts in the record support the application of at least four enhancement factors, Defendant's sentence of twenty-five years is appropriate under the circumstances presented here.

CONCLUSION

For the above reasons, the judgment of the trial court is AFFIRMED.

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THOMAS T. WOODALL, JUDGE